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Title: F/S Adopting Small Wireless Facilities Regulations To Authorize And Regulate Certain Small Wireless Facilities Installations Within City Rights Of Ways Or On City-Owned Utility Poles (Davis, Jones, Peña, Sanchez)

Sponsors:

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11/5/2018	2	City Council	Substituted	Pass
11/5/2018	2	City Council	Motion	Pass
11/5/2018	2	City Council	Passed as Substituted	Pass
10/15/2018	2	City Council	Accepted Without Recommendation, As Substituted	
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10/8/2018	1	Finance & Government Operations Committee	Sent to Council Without Recommendation, as substituted	Pass
8/20/2018	1	President	Referred	
8/20/2018	1	City Council	Introduced and Referred	

CITY of ALBUQUERQUE

TWENTY THIRD COUNCIL

COUNCIL BILL NO. F/S O-18-27 ENACTMENT NO. _____

SPONSORED BY: Pat Davis, Trudy Jones, Klarissa Peña, Ken Sanchez

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ORDINANCE

F/S Adopting Small Wireless Facilities Regulations To Authorize And Regulate Certain Small Wireless Facilities Installations Within City Rights Of Ways Or On City-Owned Utility Poles (Davis, Jones, Peña, Sanchez

ADOPTING SMALL WIRELESS FACILITIES REGULATIONS TO AUTHORIZE AND REGULATE CERTAIN SMALL WIRELESS FACILITIES INSTALLATIONS WITHIN CITY RIGHTS OF WAYS OR ON CITY-OWNED UTILITY POLES.

WHEREAS, the City desires to encourage wireless infrastructure investment by providing a fair and predictable process for the deployment of small wireless facilities, while enabling the City to manage the rights-of-way in the overall interests of the public health, safety and welfare; and

WHEREAS, the City recognizes that small wireless facilities are critical to delivering wireless access to advanced technology, broadband and 9-1-1 services to homes, businesses, and schools within the City; and

WHEREAS, the City recognizes that small wireless facilities, including facilities commonly referred to as small cells and distributed antenna systems, often may be deployed most effectively in the public rights-of-way; and

WHEREAS, certain state and federal laws relating to wireless telecommunications facilities may pre-empt some local regulation of wireless facilities, including small wireless facilities, where the preempted local regulation would have prohibited or would have had the effect of prohibiting the ability of any entity to provide telecommunications services; and

WHEREAS, this ordinance is intended to comply with and complement any such state and federal laws or regulations.

BE IT ORDAINED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:

SECTION 1. A new Article 10 is added within Chapter 5 of the Revised Ordinances of Albuquerque as follows:

“§ 5-10-1 Short Title

This Article 10 of Chapter 5 of the Revised Ordinances of Albuquerque may be cited as the “Small Wireless Facility Ordinance.”

§ 5-10-2 Purpose and Intent

(A) Purpose. The purpose of this Article is to establish policies and procedures for the placement of small wireless facilities in rights-of-way within the City’s jurisdiction, which will

provide public benefit consistent with the preservation of the integrity, safe usage, and visual qualities of the City rights-of-way and the City as a whole.

(B) Intent. In enacting this Article, the City is establishing uniform standards to address the placement of small wireless facilities in the rights-of-way, including without limitation, to:

(1) prevent interference with the use of streets, sidewalks, alleys, parkways and other public ways and places;

(2) prevent the creation of visual and physical obstructions and other conditions that are hazardous to vehicular and pedestrian traffic;

(3) prevent interference with the facilities and operations of facilities lawfully located in rights-of-way or public property;

(4) protect against environmental damage, including damage to trees;

(5) preserve the character of the neighborhoods in which facilities are installed; and

(6) facilitate rapid deployment of small wireless facilities to provide the benefits of advanced wireless services.

(C) Conflicts with Other Chapters. This Article supersedes all Chapters or parts of Chapters of the revised ordinances of Albuquerque adopted prior hereto that are in conflict herewith, to the extent of such conflict.

§ 5-10-3 Definitions

(A) “antenna” means communications equipment that transmits or receives electromagnetic radio frequency signals and that is used to provide wireless services and any comingled information services;

(B) “applicable codes” means uniform building, fire, electrical, plumbing or mechanical codes adopted by a recognized national code organization and enacted by the City, including the local amendments to those codes enacted by the authority solely to address imminent threats of destruction of property or injury to persons, to the extent that those amendments are consistent with state and federal law;

(C) “applicant” means a wireless provider that submits an application;

(D) “application” means a request submitted by an applicant to the City for a permit to collocate one or more small wireless facilities on a pre-existing or modified pole or structure or to approve the installation, modification or replacement of a utility pole or wireless support structure for purposes of a small wireless facility installation;

(E) “authority” means the City of Albuquerque;

(F) “authority utility pole” means a utility pole, owned or operated by the City in a right of way;

(G) “collocate” means to install, mount, maintain, modify, operate or replace one or more wireless facilities on, in or adjacent to a pre-existing or modified wireless support structure or utility pole;

(H) “communications services” means cable service as defined in 47 U.S.C. Section 522 (6), information service as defined in 47 U.S.C. Section 153(24), mobile service as defined in 47 U.S.C. Section 153(33), telecommunications services as defined in 47 U.S.C. Section 153(53) or wireless service other than mobile service;

(I) “design district” means an area zoned or otherwise designated by municipal ordinance and for which a municipality maintains and uniformly enforces unique design and aesthetic standards;

(J) “fee” means a one-time charge;

(K) “historic district” means a group of buildings, properties or sites that fall within the category defined in 47 C.F.R. 1.1307(a)(4) and are: (a) listed in the national register of historic places or formally determined eligible for listing in that register by the keeper of the register in accordance with the nationwide programmatic agreement found in 47 C.F. R. Part 1 Appendix C; or (b) designated as a historic district by the City;

(L) “law” includes federal, state or local law;

(M) "permit" means the written permission of the City for a wireless provider to install, mount, maintain, modify, operate or replace a utility pole for the installation of a small wireless facility or to collocate a small wireless facility on a pre-existing or modified utility pole or wireless support structure;

(N) “person”:

(1) means an individual, corporation, limited liability company, partnership, association, trust or other entity or organization; and

(2) includes the City;

(O) “private easement” means an easement or other real property right given for the benefit of the grantee of the easement and the grantee’s successors and assigns;

(P) “rate” means a recurring charge;

(Q) “right of way”:

(1) means the area on, below or above a public roadway, highway, street, sidewalk

(only as defined by the Traffic Code), alley or utility easement; and

(2) does not include the area on, below or above:

(a) a federal interstate highway;

(b) a state highway or route under the jurisdiction of the department of transportation;

(c) a private easement;

(d) a utility easement that does not authorize the deployment sought by a wireless provider; or

(e) any other City owned property not expressly included in subparagraph Q (1), above, such as but not limited to parks, open space, city facilities, bike paths as defined by the Traffic Code or multi-use trails as defined by the Integrated Development Ordinance (IDO).

(R) "small wireless facility" means a wireless facility that meets each of the following conditions:

(1) Each antenna associated with the deployment is no more than three cubic feet in volume, or could fit, inside an enclosure with a volume of three or fewer cubic feet; and

(2) It is mounted on a structure fifty feet or less in height including its antennas, or on structures no more than ten percent taller than any adjacent utility pole, wireless support structure, or electric transmission structure; and

(3) Its deployment does not require the extension or replacement of any existing structures to a height of more than fifty feet, or by more than ten percent taller than any adjacent utility pole, wireless support structure, or electric transmission structure, whichever is greater; and

(4) Its ground or pole-mounted wireless equipment is twenty-eight or fewer cubic feet in volume; and

(5) It is in all respects in compliance with federal regulations including those at 47 C.F.R. § 1.6002.

(S) "technically feasible" means that by virtue of engineering or spectrum usage the proposed placement for a small wireless facility, its design, or site location can be implemented without a reduction in the functionality of the small wireless facility.

(T) "utility pole":

(1) means a pole or similar structure used in whole or in part for communications services, electricity distribution, lighting or traffic signals; and

(2) does not include a wireless support structure or electric transmission structure;

(U) “wireless facility”;

(1) means equipment at a fixed location that enables wireless communications between user equipment and communications network, including:

(a) equipment associated with wireless communications; and

(b) radio transceivers, antennas, coaxial or fiber-optic cables, regular and backup power supplies and comparable equipment, regardless of technological configuration;

(2) includes a small wireless facility; and

(3) does not include:

(a) the structure or improvements on, under or within which the equipment is collocated;

(b) a wireline backhaul facility, coaxial cable or fiber-optic cable between wireless support structures or utility poles; or

(c) coaxial or fiber-optic cable otherwise not immediately adjacent to, or directly associated with, an antenna;

(V) “wireless infrastructure provider” means a person, other than a wireless services provider, that may provide telecommunications service in New Mexico and that builds or installs wireless communications transmission equipment, wireless facilities’ utility poles or wireless support structures;

(W) “wireless provider” means a wireless infrastructure provider or wireless services provider;

(X) “wireless services” means services provided to the public that use licensed or unlicensed spectrum, either mobile or at a fixed location, through wireless facilities;

(Y) “wireless services provider” means a person that provides wireless services;

(Z) “wireless support structure” means a freestanding structure, including a monopole or guyed or self-supporting tower, but not including a Utility pole; and

(AA) “wireline backhaul facility” means a facility used to transport services by wire from a wireless facility to a network.

§ 5-10-4 Permitted Use; Application and Application Fees

(A) Permitted Use: Collocation of a small wireless facility or installation, modification or replacement of a utility pole for the collocation of a small wireless facility, as defined herein, is permitted within all zoning districts of the IDO, subject to all applicable use specific standards, and within all rights-of-way as defined by this Article, subject only to the

restrictions in Section 5-10-5.

(B) Permit Required. No person shall place a small wireless facility in any right-of-way, without first filing a small wireless facility application and obtaining a permit therefore, except as otherwise provided in this Article. An applicant may submit a consolidated application for up to twenty-five (25) small wireless facilities so long as they are all of substantially the same type, and on substantially the same types of structures, however no more than one (1) such consolidated application may be filed within any five (5) business-day period. The City's denial of one or more small wireless facilities in a consolidated application shall not delay the processing of any other small wireless facilities submitted in the same application;

(C) Permit Application Form. All small wireless facility applications for permits filed pursuant to this Article shall be on a form, paper or electronic, provided by the City.

(D) Permit Application Requirements. Applications submitted to the City for a small wireless facility shall include the following:

(1) All relevant information otherwise required for a general wireless telecommunications collocation permit administered under the IDO;

(2) A certification by the applicant that the small wireless facility or facilities to be collocated conform with the Federal Communications Commission's regulations concerning radio frequency emissions;

(3) A certification by the applicant that unless a delay is caused by the lack of commercial power or fiber at the site, the collocation must begin within one hundred eighty (180) days of permit issuance, after which time the permit shall be void; and

(4) A reasonably acceptable showing through the application materials that the facility or facilities comply with all applicable codes.

(E) Routine Maintenance and Replacement. An application shall not be required for: (i) routine maintenance; and (ii) the replacement of a small wireless facility with another small wireless facility that is substantially similar to or the same size or smaller in size and weight and height as long as the wireless provider that owns the wireless facility notifies the authority and provides details of the proposed replacement demonstrating the substantial similarity of the replacement at least ten days before the replacement is made.

(F) Information Updates. Any amendment to information contained in a permit application shall be submitted in writing to the City within thirty (30) days after the change necessitating the amendment.

(G) Application Fees. Application Fees shall be subject to the following requirements:

(1) All applications for permits pursuant to this Article shall be accompanied by a fee related to processing the application, but shall not exceed $500.00 for non-recurring fees, including a single up-front application that includes up to five (5) small wireless facilities and an additional $100.00 for each small wireless facility beyond five (5) but not to exceed any application limits from Section 5-10-4(B).

(2) The application fee for the installation, modification or replacement of a utility pole for the collocation of a small wireless facility that is permitted in accordance with this Article shall not exceed $750 for non-recurring fees per utility pole in the rights-of-way. No additional application fee shall be required for the small wireless facility to be collocated on the newly installed, modified or replaced pole.

§ 5-10-5 Permit Applications; Conditions

(A) Review of Small Wireless Facility Applications.

(1) The City shall accept and process applications for small wireless facility permits subject to the following:

(a) Within thirty (30) days of receiving an application, the City shall determine and notify the applicant whether the application is complete. If an application is incomplete, the City shall specifically identify the missing information in writing. For each item alleged to be missing, the City must specify the code provision, ordinance, application instruction, or otherwise publicly-stated procedure that requires the submission of the information. For incomplete applications, the time for processing the application shall be tolled by the number of days from the day after the date when the City properly notifies applicant of the missing documents or information until the date on which the applicant submits all required documents or information such as to render the application complete. If the City fails to notify the applicant of incompleteness within thirty (30) days, the application is deemed complete.

(b) Make its final decision to approve or deny the application within: (i) sixty (60) days of first receiving the complete application material for collocation of a small wireless facility on an existing utility pole, or (ii) ninety (90) days of first receiving the complete application material for the installation of a new utility pole or the replacement of an existing utility pole with a new utility pole. In extraordinary circumstances where a batch application causes legitimate overload on the City’s resources, the City and an applicant may agree to a reasonable extension of this period. An applicant shall not unreasonably deny any City requests to extend this period;

and

(c) Advise the applicant in writing of its final decision, and in the final decision document the basis for a denial, including the provisions in the specific code or ordinance on which the denial was based, and send the documentation to the applicant on or before the day the City denies the application. The applicant may cure the deficiencies identified by the City and resubmit the application within thirty (30) days of the denial without paying an additional application fee. The City shall approve or deny the revised application within thirty (30) days of receipt of the amended application. The subsequent review by the City shall be limited to the deficiencies cited in the original denial.

(2) If the City fails to act on an application within the review period prescribed in subsection (1)(b) above, this inaction shall constitute a “failure to act” under Section 332(c)(7)(B)(v) of the federal Telecommunications Act and presumptive prohibition of services within the meaning of Section 332(c)(7)(B)(i)(II) and applicant may seek remedies for these violations.

(3) The City may deny a proposed collocation of a small wireless facility on an existing or modified pole, the installation of a new utility pole or the replacement of a an existing utility pole for the collocation of a small wireless facility, where the proposed small cell facility:

(a) Materially and demonstrably interferes with public safety, such as the safe operation of traffic control equipment;

(b) Materially and demonstrably interferes with sight lines or clear zones for transportation or pedestrians;

(c) Materially interferes with the Americans with Disabilities Act of 1990 or similar federal or state standards regarding pedestrian access or movement;

(d) Fails to comply with applicable codes; including requirements imposed upon small wireless facilities located in design overlay zones and/or historic districts;

(e) Does not comply with objective, reasonable and technically feasible design, aesthetic, spacing, placement, and/or construction standards for small wireless facilities as adopted, published, and administered by the City in any form now or in the future;

(f) Does not comply with reasonable stealth or concealment standards for utility poles as adopted, published and administered by the City in any form now or in the future;

(g) Due to ground-mounted equipment, impedes pedestrian movement on any sidewalk or walkway or otherwise diminishes a sidewalk’s width;

(h) Is proposed within a right-of-way location along a roadway that is fifty-feet

wide or less, as measured from curb to curb, and fronted on at least one side by a residential use, or an IDO zone authorizing residential uses, unless the applicant demonstrates that placement of the small wireless facility at such a location is necessary to fill a significant gap in service and no reasonable alternatives exist; and

(i) Is proposed on a new utility pole or wireless support structure within a right-of-way where the applicant has not adequately explained why it could not use an existing or replacement utility pole or wireless support structure either owned by the City or by a third-party.

(4) Under its general authority the City may at any time, and otherwise specifically reserves its right under federal law to, impose design, aesthetic, spacing, placement, and/or construction standards for small wireless deployments.

(B) Permit Notice; Conditions.

(1) The City may, at its discretion and prior to final approval (subject to the shot clock limitations of Section ‘A’ above) provide or require the applicant to provide, public notice of the proposed small wireless facility in accordance with the notice provisions of the IDO, notifying interested persons of the opportunity to submit written comments on the application to the City. The City shall forward such written comments to the applicant within three (3) days of their receipt, and the applicant shall respond to any such comments. The applicant’s failure to respond is grounds for the application being deemed incomplete by the City.

(2) The City may condition its approval on a requirement that a utility pole or wireless support structure be replaced before an application for a collocation is approved if the City determines that such a replacement is required by an applicable code or law.

§ 5-10-6 Small Wireless Facilities in the ROW; Maximum Height; Other Requirements

(A) Maximum Size. Small wireless facilities, and new or modified utility poles for the collocation of small wireless facilities may be placed in the rights-of-way pursuant to this Article subject to the following requirements:

(1) Each new or modified utility pole installed in the rights-of-way shall not exceed the greater of:

(a) Ten percent in height above any existing utility pole in the rights-of-way in place as of the effective date of this Article located within 500 feet of the new pole in the same rights-of-way; or,

(b) Fifty (50) feet above ground level.

(2) New small wireless facilities in the rights-of-way may not extend existing

structures on which they are located to a height of more than fifty feet or by more than ten percent, whichever is greater:

(B) Zoning. Any wireless provider that seeks to install, modify, operate or replace a utility pole in the rights-of-way that exceeds the height or size limits contained in this section, shall be subject to any applicable zoning requirements.

(C) Decorative Poles. A wireless provider shall be permitted to replace a decorative pole when necessary to collocate a small wireless facility, but only where the replacement pole conforms to the design aesthetics of the decorative pole being replaced and any other design applicable design requirements for the area.

(D) Underground District. The City may deny a request to install, replace or modify a utility pole in areas requiring underground utilities. The wireless provider is permitted to seek a waiver of the undergrounding requirements for the placement of a new utility pole to support small wireless facilities. **Notwithstanding anything contained in this paragraph to the contrary, any City requirement that *all* wireless facilities be deployed underground would amount to an effective prohibition given the propagation characteristics of wireless signals.**

(E) Historic and Design Districts. The City may require reasonable, technically feasible, non-discriminatory and technologically neutral design or concealment measures and reasonable measures for conforming to the design aesthetics of a design district or Historic District. Any such design or concealment measures may not have the effect of prohibiting any provider's technology; nor may any such measure be considered part of the small wireless facility for purpose of the size restrictions in the definition of small wireless facility.

§ 5-10-7 Effect of Permit

(A) Authority Granted. No Property Right or Other Interest Created. A permit from the City authorizes an applicant to undertake only certain activities in accordance with this Article, and does not create a property right or grant authority to the applicant to impinge upon the rights of others who may already have an interest in the rights-of-way.

(B) Permit Duration. Any work described in a permit granted pursuant to this Article shall be completed within one hundred eighty (180) days of the Permit issuance date unless the City and applicant agree to extend this period due to delay caused by the lack of commercial power or communications facilities. Subject to applicable relocation requirements and applicant's right to terminate a permit at any time, a permitted location is

valid for a period of ten (10) years, and must be renewed for successive ten-(10) year terms so long as the wireless provider is in compliance with the other requirements in this Article as of each extension date.

§ 5-10-8 Removal, Relocation or Modification of Small Wireless Facility in the ROW.

(A) Notice. Within ninety (90) days following written notice from the City, wireless provider shall, at its own expense, protect, support, temporarily or permanently disconnect, remove, relocate, change or alter the position of any small wireless facilities within the rights-of-way whenever the City has determined that such removal, relocation, change or alteration, is reasonably necessary for the construction, repair, maintenance, or installation of any City improvement in or upon, or the operations of the City in or upon, the rights-of-way.

(B) Emergency Removal or Relocation of Facilities. The City retains the right and privilege to cut or move any small wireless facility located within the rights-of-way of the City, as the City may determine to be necessary,
appropriate or useful in response to any public health or safety emergency. If circumstances permit, the City shall notify the wireless provider and provide the wireless provider an opportunity to move its own facilities prior to cutting or removing a facility and shall notify the wireless provider after cutting or removing a small wireless facility.

(C) Abandonment of Facilities. Upon abandonment of a small wireless facility within the rights-of-way of the City, the wireless provider shall notify the City of its intention to discontinue use of a small wireless facility or utility pole. The notice shall inform the authority of the time and the way in which the small wireless facility or utility will be removed. The wireless provider is responsible for the costs of the removal. The authority may require the wireless provider to return the property to its pre-installation condition. If the wireless provider does not complete the removal within forty-five (45) days after notice, the authority may complete the removal and assess the costs of removal against the wireless provider.

(D) Damage and Repair. The City may require a wireless provider to repair all damage to the rights-of-way caused by the activities of the wireless provider and return the rights-of-way to its pre-damage condition according to the City's requirements and specifications. If the wireless provider fails to make the repairs within a reasonable period

after written notice, the City may affect those repairs and charge the applicable party the reasonable, documented cost of such repairs.

§ 5-10-9 ROW Rates

(A) Annual Rate. A wireless provider authorized to place small wireless facilities in the rights-of-way shall pay to the City compensation for use of the rights-of-way in the amount of $270.00 annually per small wireless facility for all recurring fees, including any right-of-way access fee and/or fee for attachment to City-owned utility poles in the right-of-way.

(B) Cease Payment. A wireless provider is authorized to remove its facilities at any time from the rights-of-way and cease paying the City compensation for use of the rights-of-way.

(C) The City may adjust the fees and annual rate, but no more often than once a year and by no more than an amount equal to one-half the annual change, if any, in the most recent consumer price index for all urban consumers for New Mexico, as published by the United States Department of Labor. The City shall notify all wireless providers who are charged of the pre-adjusted rate and of any prospective adjustments, and shall make the adjustment effective sixty-days or more following such notice. These limitations on the frequency and amount of annual fee increases do not apply if the City seeks an amendment, pursuant to Section 5-10-11 of this ordinance and to Federal Communications Order 18-01333, to adjust right-of-way rates to recover the City's reasonable costs of maintaining and managing the rights-of-way and the structures in the rights-of-way and any other costs of administering this Ordinance.

§ 5-10-10 Attachment to City Utility Poles in the ROW

(A) Collocation on City Poles. Small wireless facilities may be collocated on City utility poles pursuant to this Article. No person will be permitted an exclusive arrangement to attach to city poles.

(B) Make-Ready. The rates, fees, terms and conditions for the make ready work to collocate a small wireless facility on a city utility pole must be nondiscriminatory, competitively neutral, comply with this Article and be subject to the following:

(1) The City or any person owning, managing, or controlling the city poles shall provide a good faith estimate for any make-ready work necessary to enable the pole to support the requested small wireless facility,

including pole replacement if necessary, within sixty (60) days after receipt of a completed request.

(2) The City or any person owning, managing, or controlling the city poles shall not require more make-ready work than required to meet applicable codes or industry standards. Fees for make-ready work shall not include costs related to pre-existing for prior damage and non-compliance. Fees for make-ready work including any pole replacement shall not exceed actual costs or the amount charged to others for similar work and shall not include any consultant fees or expenses.

§ 5-10-11 Regulations and Amendments; and Compliance with Laws.

(A) The City may at any time under its general authority amend the provisions of any ordinance, and will endeavor to so amend this Article as necessary in order to remain consistent with any federal laws, regulations, or orders now or in the future, as well as to bring it into compliance with any court orders related to the same; and will further endeavor to amend this Article as may be necessary in order to manage its rights-of-way or to recover the reasonable costs of maintaining and managing its rights-of-way and the structures in the rights-of-way and any other costs of administering this Article.

SECTION 2. COMPILATION. Section 1 of this Article shall amend, be incorporated in and made part of the Revised Ordinances of Albuquerque, New Mexico, 1994.

SECTION 3. EFFECTIVE DATE. This Article shall take effect five (5) days after publication by title and general summary.

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